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In The

Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I.

THE COURT SHOULD DECLINE INVITATIONS TO ABANDON ITS INTENT-BASED JURISPRUDENCE OF IMPLIED STATUTORY RIGHTS

Respondents and their amici paint a dismal picture of § 10(b) indeed. Unanimously, they portray it as a ship cut loose from its moorings which this Court can neither tie up nor anchor where it floats. A statute which authorized an administrative agency to make rules to regulate markets has become, they say, a charter for federal judges to invent civil claims for the sake of judicially perceived public policy.

Worse, the arguments for contribution in this case would cut the hawsers of every statute in which a federal court has implied a private right of action.

The slippery, policy-based jurisprudence of implied rights advocated by Respondents and amici contradicts the Court's principles of implied rights. The Court should not abandon its principles in this case.

A. The Court Should Reject Expansion Of Federal Common Law In The Guise Of "Fleshing Out" The Victim's Claim.

Respondents and those amici who discuss the source of federal law-making power all urge the Court to adopt contribution as a "fleshing out" or "rounding out" of the victim's § 10(b) implied cause of action.[1] Respondents and amici use "fleshing out" to avoid confronting an argument they cannot win. Not a single brief can refute Petitioners' demonstration that under the analysis of *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), federal courts have not been granted the power to craft federal securities common

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[1] Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) (1988) will be referred to simply as § 10(b). The Securities Act of 1933 will be referred to as the "1933 Act." The Securities Exchange Act of 1934 will be referred to as the "1934 Act."

law. Brief for Petitioners 32-37; *see Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979) (no authority to create private rights arises from the 1934 Act's general grant of jurisdiction to federal courts).

"Fleshing out" substitutes in the briefs for analysis of whether Congress granted federal courts the power to create federal securities common law. One brief admits as much. (Brief of the First Boston Corporation, et al., as Amici Curiae in Support of Respondents ("FB") 12-13.) Certainly the Ninth Circuit thinks it has such federal common law powers, as it builds its ever more complex jurisprudence of contribution and its consequences. *Employers Insurance of Wausau v. Musick, Peeler & Garrett*, 954 F.2d 575, 579 (9th Cir. 1992).

Surprisingly, Respondents and the Securities and Exchange Commission ("Commission") all rely for their fleshing or rounding theories on the very case which precludes them. *Virginia Bankshares, Inc. v. Sandberg*, No. 89-1448, slip. op., 115 L.Ed.2d 929 (U.S. June 27, 1991). There, the Court commented that once "private statutory rights [have] developed without clear indications of congressional intent" the Court may recognize claims of persons not embraced within the original implication when the failure to do so "would be demonstrably inequitable to a class of would-be plaintiffs with *claims comparable to those previously recognized*." *Id.* at 953 (emphasis added). The inquiry, however, is limited to "deciding where the outer limits of the right should lie", not creating new rights. *Id.*

There is nothing "comparable" between a victim's right to recover losses under § 10(b) and a perpetrator's claim to share the burden of compensating the victim. Neither does this case probe the outer limits of victims' § 10(b) rights; it concerns victims only through its adverse collateral consequences.

- Indisputably, contribution is a new cause of action, vested in a perpetrator of securities fraud rather than in a victim. The Commission admits that contribution is an independent right of action under *Texas Industries*. (Brief for the Securities and Exchange Commission as Amicus Curiae in Support of Respondents ("SEC"), 11.)
- Indisputably, contribution is unnecessary to providing justice to victims of fraud, nor is it a defense against the charge of fraud. The party seeking contribution has lost nothing at all until it compensates a victim for its own wrongdoing.
- Indisputably, contribution adds parties to cases and generates additional cases.

Arguing for "fleshing out", the Commission contradicts positions the United States urged upon the Court last term. The United States argued that "the power to create remedies for violations of federal statutes rests exclusively with Congress." Brief of the United States as Amicus Curiae Supporting Respondents, *Franklin v. Gwinnett County School District*, No. 90-918, at 4. The United States urged that Congress should be deemed to exercise the power to create a remedy only by passing a law that affirmatively authorizes the remedy. *Id.* at 4-5. Now, the Commission supports Respondents' request to create a whole cause of action because, "Defendants . . . are entitled to have § 10(b) applied fairly to them." (SEC 11.) By the United States' own principles, this puts the answer before the proper question.

The Commission also argues that inventing a contribution cause of action "is not a large step." *Id.* To the contrary, it is a giant leap. The "fleshing out" theory applies indistinguishably to every implied right of action ever recognized by a federal court. As it "fleshed out" § 10(b), the Court would hang the same meat on at least the following important private causes of action: the Commodity Exchange Act (7 U.S.C. §§ 1-26);[2] § 14 of the 1934 Act (15 U.S.C. § 78n);[3]

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[2] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 356 (1982).

[3] *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964); *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973).

§ 901 of Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681-1758);[4] § 504 of Rehabilitation Act of 1973 (29 U.S.C. § 794);[5] § 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c);[6] implied causes of action under civil rights law (42 U.S.C. §§ 1981 and 1982).[7]

B. No Principled Distinction Exists Between Implied and Express Victims' Remedies For The Purpose of Analyzing Whether To Imply Contribution.

Respondents and the Commission compose a false distinction between implied causes of action and express causes of action. The same analysis which foreclosed contribution in antitrust cases (*Texas Industries*, 451 U.S. 630) should foreclose contribution in § 10(b) cases. In *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310-311 (1985), this Court rejected distinctions in analysis between express and

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[4] *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979); *Franklin v. Gwinnett County Public Schools*, No. 90-918, slip op., 117 L.Ed.2d 208 (U.S. Feb. 26, 1992).

[5] *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-86 (7th Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977). *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984).

[6] *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

[7] Implied private cause of action: *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). Conflict regarding implied contribution: *Wright v. Reynolds*, 703 F.Supp. 583, 591 (N.D. Tex. 1988). *Gray v. City of Kansas City, Kan.*, 603 F.Supp 872, 874 (D. Kan. 1985) (no right to contribution under 42 U.S.C. §§ 1981 or 1983); *Anderson v. Loc. U. No. 3, Intern. Broth. of Elec.*, 582 F.Supp. 627 (S.D.N.Y. 1984), *aff'd*, 751 F.2d 546 (2d Cir. 1984)(no implied right to contribution or indemnity among joint Title VII and § 1981 defendants); *Miller v. Apartments & Homes of N.J., Inc.*, 646 F.2d 101 (3d Cir. 1981) (implying right of contribution).

implied causes of action and specifically welded antitrust analysis and § 10(b) analysis. The Court rejected the argument that it should use different policy analysis to determine the application of the pari delicto defense to § 10(b) cases than it had used to consider the same defense in antitrust cases. *Id.* at 309-310. Properly understood, *Bateman Eichler* teaches that federal courts should invent no more federal common law surrounding an implied cause of action than would be necessary if the cause of action had been created expressly by Congress.

Nothing in any of the briefs supplies justification for the Court to depart from its intent-based jurisprudence of implied contribution claims.

II.

RESPONDENTS AND AMICI FAIL TO SHOW AFFIRMATIVE INTENT OF CONGRESS TO CREATE A RIGHT OF CONTRIBUTION

A. Respondents And Amici Use The Wrong Analysis To Determine Congressional Intent.

In one way or another, Respondents and the Commission all argue that the Court should apply the "most analogous statute" analysis of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, No. 90-333, slip op., 115 L.Ed.2d 321 (U.S. June 20, 1991), *reh'g denied*, 115 L.Ed.2d 1109. The "most analogous statute" test is an analytical model of last resort, used when the Court is forced to choose between two forms of a mandatory procedure. As a matter of history and precedent, virtually every enforcement process needs a statute of limitations. No claim needs a right of contribution. The Court rightly looks for clear and affirmative congressional intent to create a right of contribution. *Texas Industries, Inc.*, 451 U.S. at 638. No brief explains why the Court should abandon the affirmative intent test and either impute to Congress an intent which did not exist or use last resort reasoning when last resort conditions do not exist.

B. Congress Did Not Have A Clear And Affirmative Intent.

Respondents and amici fail to explain material gaps in Congress' creation of contribution rights in the express civil remedy sections of the 1933 and 1934 Acts. First, respondents and amici improperly relegate § 12 of the 1933 Act to footnotes or oblivion, lacking a substantive basis to explain why Congress did not grant contribution claims to § 12 defendants. Separating the 1933 and 1934 acts is not historically or intellectually proper, as the Commission especially should know. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976), *reh'g denied*, 425 U.S. 986 (1976). Section 12 imposes liability on persons who sell unregistered securities or sell securities by means of a materially false communication. It cannot be distinguished on the ground that it applies to transactions involving face-to-face buyers and sellers while § 10(b) applies to markets; this Court found, through the plain meaning of the definition of "security", that § 10(b) was intended to apply to both personal transactions (including sales of whole businesses) and impersonal markets. *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985).

Neither can § 16(b) of the 1934 Act be casually turned away. A control person can be liable for short swing profits received by a controlled person, irrespective of whether the control person received any of the profits. Neither § 16(b) (15 U.S.C. § 78p(b)) nor § 20(a) (15 U.S.C. § 78t(a)) provides for the control person to have contribution against the person who actually received the profit.

Respondents and the Commission also incorrectly dismiss the omission of contribution from the control person liability sections of the 1933 and 1934 Acts. *See* 1933 Act § 15 (15 U.S.C. § 77o) and 1934 Act § 20 (15 U.S.C. § 78t). Their argument is textually debatable because the control person sections impose liability "to the same extent as the controlled person" without expressing any grant of correlative rights; contribution is not a limitation on liability but a prospect of sharing it. Their argument also fails to take into

account § 20's substantive terms, which Congress might have expected to have civil money damages consequences. Section 20 prohibits both doing through others that which one is prohibited from doing directly and hindering an issuer from making its required reports. Respondents' distinction of control person sections is historically weak because the legislative history fails to indicate Congress considered whether control persons would have contribution claims. H.R. Rep. No. 1383, 73d Cong. 2d. Sess. (1934) 26 (control person liability was then contained in § 19 of the bill); H.R. Rep. No. 1838, 73d Cong. 1st. Sess. (1934) 19, 37 (control person liability was contained in § 20 of the bill but was discussed as § 19); S. Rep. No. 792, 73d Cong. 2d Sess. (1934) 22. Finally, the argument is fanciful because it assumes Congress anticipated an interpretation made 45 years after enactment by only one of several courts to consider whether control persons have contribution claims. *Compare Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672, 675 (9th Cir. 1980), *cert. denied*, 452 U.S. 963 (1981) with *In re Olympia Brewing Co. Sec. Litig.*, 674 F.Supp. 597, 615 n.18 (N.D. Ill. 1987); Loewenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 Duke L.J. 543, 551 (1982).

The Commission incorrectly argues that the Insider Trading and Securities Fraud Enforcement Act of 1988 ("§ 20A")[8] is not relevant. The Commission contends Congress must have omitted contribution from § 20A because a defendant is "essentially liable" only for its own gain. (SEC. 19.) This is a strangely constricted reading of § 20A; although the total liability of all defendants is limited to the profit gained or loss avoided, both controlling persons and tippers may be jointly and severally liable notwithstanding they gained nothing and avoided no loss. §§ 20A(b)(3) and 20A(c).

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[8] Pub. L. No. 100-704, § 5, 102 Stat. 4680, adding section 20A to the 1934 Act (15 U.S.C. § 78t-1).

C. Congress Has Not Ratified Contribution Under § 10(b).

Respondents (but not the Commission) suggest that lower courts' creation of contribution claims has been ratified by Congress. If a large number of lower court decisions regarding § 10(b) equated to congressional ratification, *Lampf* was wrongly decided.[9] Although a ratification argument might have some force if Congress had legislated regarding contribution over the years, the fact remains that neither Respondents nor amici can identify a single occasion when Congress mentioned the subject, even in a committee report.

The history of contribution differs markedly from the histories of rules discussed in the authorities cited by Respondents. In *Merrill Lynch*, the Court had recognized victims' private actions under the Commodities Exchange Act ("CEA") before Congress undertook "a comprehensive reexamination and significant amendment of the CEA." *Merrill Lynch, Pierce, Fenner & Smith*, 456 U.S. at 380. The Court considered congressional oversight as a factor because extensive analysis of the legislative history showed Congress specifically considered the victims' implied claims and just as specifically preserved those claims. *Id.* at 382-388. In *Herman*, the Court commented that Congress in 1975 had conducted " 'the most searching reexamination of the competitive, statutory, and economic issues facing the securities markets, the securities industry, and, of course, public investors, since the 1930's.' " *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385, n.20 (1983) (quoting House Conference Report). At that time, the victim's § 10(b) claim had

[9] "During the ensuing four decades of administering § 10(b) litigation, the federal courts also applied settled law when they looked to state law to find the rules governing the timeliness of claims. [Citations omitted.] It was not until 1988, that a federal court decided that it would be better policy to have a uniform federal statute of limitations to apply to claims of this kind." *Lampf*, 115 L.Ed.2d at 338 (Stevens, J. and Souter, J., dissenting).

been recognized for nearly 30 years, often in cases where plaintiffs sought relief under several statutes. The Court said the history "suggests" Congress ratified the decisions permitting victims to pursue § 10(b) claims and other remedies together. In holding that fraud victims were not limited to express remedies where available, the Court placed little emphasis on the suggestion of ratification. In short, *Merrill Lynch* and *Herman* identify the outer limits of ratification as a factor in determining Congress' intent.

Respondents' ratification argument far exceeds the outer limits. At the 1975 reexamination of the securities laws, the first case recognizing contribution was only seven years old. *deHaas v. Empire Petroleum Co.*, 286 F.Supp. 809 (D. Colo. 1968), *aff'd in part, rev'd in part*, 435 F.2d 1223 (10th Cir. 1970). Contribution had penetrated the level of the Courts of Appeals only in a per curiam affirmance. *Globus, Inc. v. Law Research Service, Inc.*, 442 F.2d 1346 (2d Cir. 1971), *cert. denied*, 404 U.S. 941 (1971). Cases implying contribution were not unanimous; the first published decision denied contribution. *Shea v. Ungar* [1964-1966 Transfer Binder] Fed. Sec. L. Rep. CCH ¶ 91,558 (S.D.N.Y. 1965). Respondents cannot point to anything in Congressional review of securities law which suggests Congress has noticed the implication by some courts of contribution in § 10(b). Ratification analysis fails to aid Respondents.

Respondents Employers Insurance of Wausau and Federal Insurance ("Employers") uniquely attempt to argue ratification from the legislative history of § 20A (Brief for Respondents ("EMP") 11-17), but that history demonstrates Congress' exclusive concern for claims of victims of fraud and insider trading. The report of the House Energy and Commerce Committee specifically recognized the statute would impose liability on tippers and controlling persons, a matter which was the subject of amendment at the committee level, but did not discuss the possibility of granting contribution rights. H.R. Rep. No. 100-910, 100th Cong. 2d Sess. 27, 39 (1988), 7 U.S. Code Cong. & Admin. News. 6043, 6064,

6076 (1988). The Committee expressed concerns of excessive liability, much like those expressed by Respondents and amici, but resolved those concerns by limiting damages without mentioning contribution. *Id.* The Committee's discussion of the non-interference language of § 20A(d) dispels any notion that the Committee considered any implied rights of action other than claims of victims of fraud:

> At the full Committee markup, the Committee also accepted an amendment to delete the paragraph containing an express private right of action for parties other than contemporaneous traders. The Committee's intention in this amendment was to avoid creating an express private cause of action which might have the unintended effect of freezing the law or in any way restricting the potential rights of action which have been implied by the courts in this area. Rather, the Committee wanted to given (sic) the courts leeway to develop such private rights of action in an expansive fashion in the future.

Id. at 27, 6064. In short, the Committee focused exclusively on victims' claims, indeed, even more exclusively on claims by victims of misappropriation of inside information.[10] Employers' truncated quotations of the above paragraph of the Committee report and another paragraph on the same topic paint an inaccurate picture of Congress' words and intent.[11] Nowhere in the portion of the report relating to

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[10] This Court reached the same conclusion based on the language of § 20A: "The language of § 20A makes clear that the 100th Congress sought to alter the remedies available in insider trading cases and *only* in insider trading cases. *Lampf*, 115 L.Ed.2d at 335

[11] After discussing a case in which misappropriation of inside information allegedly caused a purchaser to pay an excessive price in a tender offer takeover, the Committee wrote:

> The section on private rights of action explicitly states that nothing in this section may be construed in any fashion to limit or condition the right of any person to bring an action to enforce a requirement of the Exchange Act, or the availability of any cause of action implied under the Exchange Act. The Committee in fact expressly recognizes the implied right of action under the securities laws for cases including but not limited to the situations such as that noted above in the Anheuser-Busch case.

Id. at 28; 6065.

private rights of action is there any suggestion that the Committee thought about contribution. *Id.* at 26-28; 6063-6065.

D. Various Other Arguments Of Respondents Actually Support Petitoners.

Employers incorrectly contend the history of the pari delicto defense supports implied rights of contribution. The legislative history lacks reference to the pari delicto defense, but if the Court correctly understood general congressional intent regarding enforcement, contribution in its most general application violates the principles of pari delicto. If contribution is administered pro rata "as in contract"[12] (Restatement of Restitution § 85 (1937)) or in a manner that a person 30% responsible may recover against one 10% responsible, it contradicts the principle barring a claim by a plaintiff who "bears at least substantially equal responsibility for the violations he seeks to redress . . . ." *Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 310-311.[13]

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[12] 1933 Act § 11(f) (15 U.S.C. § 77k(f)); 1934 Act § 9 (15 U.S.C. § 78i); 1934 Act § 18 (15 U.S.C. § 78r).

[13] Employers contend *Bateman Eichler* supports contribution by misinterpreting that decision to say co-violators should be allowed to sue each other in order to expose each other. What *Bateman Eichler* observed was that applied to a tippee, the pari delicto defense would remove any incentive to sue a fraudulent tipper, thus undermining the goal of exposing the tipper. *Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 315-316. Denying contribution has no such effect because it does not limit the real victim's incentive to sue any perpetrator and, once suit is commenced, to conduct discovery to identify all perpetrators.

Volunteer Respondents Peat Marwick Main & Co. et al. ("Peat") and several amici improperly attempt to impute to Congress the policy judgments they now advocate. Those amici also base their policy arguments on the supposedly beneficent effect of sharing liability according to relative fault. The arguments comprise an oxymoron because contribution "as in contract" and in tort was administered pro rata without regard to relative fault in 1933 and 1934. Restatement of Restitution § 85 (1937) (proportionate sharing in contract); Restatement of Restitution § 86 (1937) (rule of § 85 applies when contribution is available in tort); *see* Restatement of Restitution § 88 (1937) (contribution is not available to a tortfeasor who is guilty of negligent or worse conduct).[14] Although flaw fills the policy arguments, the point here is that there is no evidence Congress adopted any policy argument whatsoever. None of the parties can contradict Petitioners' statement that the record is absolutely silent regarding Congress' reasons for including contribution in some private securities remedy statutes.[15]

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[14] Certainly contemporaneous commentators understood Congress to mean that contribution would be administered pro rata. Douglas and Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 178-81 (1933); 3 Loss, Securities Regulation 1771-72 (2d ed. 1961).

[15] Employers argue that the Court should defer to the Commission's "construction" of § 10(b), calling Rule 10b-5 and Commission's amicus brief such a construction. The Commission makes no such argument. The Court foreclosed the same argument in *Ernst & Ernst*, 425 U.S. 212-214. There the Commission argued that its interpretation of § 10(b), through Rule 10b-5, as encompassing negligence deserved this Court's deference. The Court deferred neither to the Commission's amicus arguments nor to its view of Rule 10b-5. Holding that scienter is an element of a violation of § 10(b), the Court emphasized that the Commission lacks power to make law.

III.

POLICY SUPPORTS A RULE OF NO CONTRIBUTION

Respondents and amici devoted substantial energy and 80 pages to policy arguments. Two briefs are devoted entirely to policy and an issue outside the scope of the Petition. (Brief of American Institute of Certified Public Accountants as *Amicus Curiae* in Support of Respondents ("AICPA"); Brief of *Amicus Curiae* Securities Industry Association in Support of Respondents ("SIA"). *See* EMP, 6-11, 37-46; Brief for Respondents Peat Marwick Main & Co., et al. ("PEAT"), 21-30; FB, 12-27 and SEC 22-26.)

In all the policy briefing, only one statement is wholly supportable. Regarding this Court's evaluation of policies for or against contribution, the Commission wrote:

> Without the benefit of congressional guidance, this Court has declined to strike that balance on its own in interpreting the scope of express rights in federal statutory schemes. (SEC, 21.)

If there is to be policy analysis, it must begin with the context of § 10(b) actions, a context ignored by Respondents and amici. Respondents and amici argue contribution policy as if § 10(b) resembled the common law of negligence. This Court has endorsed only intentional dishonesty as a state of mind triggering § 10(b) liability. *Ernst & Ernst*, 425 U.S. at 214. The Courts of Appeal also recognize recklessness as scienter. No party supporting contribution pointed out the rigor of the definition of recklessness adopted by the Courts of Appeal. A defendant with a white heart and empty head escapes liability. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1570 (9th Cir. 1990) (en banc), *cert. denied*, 113 L.Ed.2d 719 (1991) (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977)).

> Reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which

> presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.

Hollinger, 914 F.2d at 1569 (quoting *Sundstrand Corp.*, 553 F.2d at 1045). *Accord Cook v. Avien, Inc.*, 573 F.2d 685, 692 (1st Cir. 1978); *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 46-47 (2d Cir. 1978), *cert. denied*, 439 U.S. 1039 (1978); *McLean v. Alexander*, 599 F.2d 1190, 1197-98 (3d Cir. 1979); *Broad v. Rockwell Intern. Corp.*, 642 F.2d 929, 961-62 (5th Cir. 1981), *cert. denied*, 454 U.S. 965 (1981); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1025 (6th Cir. 1979); *Hackbart v. Holmes*, 675 F.2d 1114, 1118 (10th Cir. 1982); *S.E.C. v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982).

Taking a § 10(b) violation in context, as a scienter-based offense, the policy arguments made for contribution do not stand up.

Respondents and amici spend too little time examining how to effectuate Congress' regulatory intent, the most important policy value. *See, Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 315. The briefs recapitulate an argument this Court has not found persuasive, that the supposed certainty of some loss is a better deterrent than the risk of major loss. (AICPA, 13-15; SIA, 14-18; EMP, 37; PEAT, 24.) The argument is particularly unpersuasive where the underlying offense requires at least intentional disregard of the truth and thus always implicates the wrongdoer's ability to weigh consciously the risks and rewards of action.

The Commission's position is particularly curious. Although its primary interest in this case should be deterring securities fraud, the Commission devotes two short paragraphs to admitting it has no real information whether contribution affects deterrence and cannot mount an argument based on economic theory. (SEC, 23.) The Commission's position contradicts the position of the United States in *Texas Industries*, where the United States argued:

> To the extent that the traditional rule against contribution has any effect on potential violators, the United States believes that it is more likely that the risk of bearing a disproportionately large share of the damages liability encourages adherence to the law, particularly to the extent that corporate managers are "risk averse". . . .

Brief for the United States as *Amicus Curiae* in Support of Respondents, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, No. 79-1144 at 12-13. The heading of the United States' argument said it all: "Contribution Is Not Necessary To Effectuate Any Purpose Of The Antitrust Laws, And Such A Remedy Would Undermine Efficient Antitrust Enforcement." *Id.* at 10. The United States also recognized that the added cost of adjudicating contribution could discourage injured parties from bringing enforcement actions. *Id.* at 15-16.

The very alignment of amici in this case demonstrates that a rule of no contribution best serves the deterrent purposes of § 10(b). Amici, other than the Commission, are a trade association for the accounting profession, a trade association for members of the securities industry and certain major investment bankers. The investing public must count upon accountants and securities professionals to assure the integrity of the market.[16] The private amici obviously believe

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[16] *Accountants: United States v. Arthur Young & Co.*, 465 U.S. 805, 819 (1984) ("Thus, the independent auditor's obligation to serve the public interest assures that the integrity of the securities markets will be preserved. . . . "); AICPA Professional Standards § 53.01 through § 53.04 (1988) (e.g., "A distinguishing mark of a profession is acceptance of its responsibility to the public. The accounting profession's public consists of clients, credit grantors, governments, employers, investors, the business and financial community and others who rely on the objectivity and integrity of certified public accountants to maintain the orderly functioning of commerce.")

Securities Professionals: Bateman Eichler, Hill Richards, Inc., 472 U.S. at 315 (denying the *pari delicto* defense to insiders and professionals who tip inside information "will best promote the primary objective of the

contribution reduces their exposure in fraud litigation; contribution thus minimizes their incentive to perform their functions. Amici illustrate the validity of the Easterbrook, Landes & Posner risk adversity analysis.[17] Indeed, the battle of amici on the issue of proportional fault, not raised by the Petition, illustrates their real agenda. The deeper purpose for supporting contribution is to use contribution-driven settlement procedures to repeal *de facto* the accepted rule of joint and several liability to fraud victims and replace it with several liability proportionate to relative fault.

Respondents and amici contend "fairness" supports contribution. (EMP, 38-40; PEAT, 22-23; AICPA 6-12; FB 18-20; SEC 22-23.) The Commission's position is surprising because it contradicts the position of the United States in *Texas Industries*. There, the United States urged the Court, "Implying a common law right of contribution in antitrust cases based on judicial perceptions of 'fairness' is particularly hazardous in antitrust cases since fairness arguments often cut both ways." Brief for the United States as *Amicus Curiae* in Support of Respondents, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, No. 79-1144 at 21. The United States pointed out that considerations of fairness do not support "contribution in cases of intentional or *reckless* wrongdoing." *Id.* (emphasis added). Petitioners here agree with the United States in *Texas Industries* that there is no reason to relieve any intentional or reckless wrongdoer of the full consequences of his or her misdeeds. *Id.* at 22. It is not possible, as one amicus put it, to be "tangentially related" to a scienter-dependent wrong. As in antitrust, the participation of all defendants is usually required for the successful perpetration of securities fraud. *Id.*

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federal securities laws – protection of the investing public and the national economy through the promotion of 'a high standard of business ethics . . . in every facet of the securities industry.' ")

[17] Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: a Legal and Economic Analysis*, 23 J. Law & Econ. 331, 332, 353 (1980).

at 22. And, of course, the states have not "overwhelmingly" adopted contribution for scienter-based torts. See Restatement (Second) of Torts § 886A and comments j and k (1979).

The "fairness" assertions are bound up with expressions of fear of coerced or collusive settlements. The briefs quote as support narrative from *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), *reh'g denied*, 423 U.S. 864 (1975). They disregard the fact that the Court's comments in *Blue Chip* pre-dated *Ernst & Ernst*'s scienter requirement by a year. None of the briefs offers any empirical evidence that accountants or securities professionals are coerced to settle cases dependent upon scienter. The United States correctly pointed out the absence of any evidence of a problem of coercion in the antitrust field, where (a) simple damage exposure is at least as great as in securities cases, (b) simple damages are trebled and (c) contribution has never been allowed. Brief for the United States as Amicus Curiae in Support of Respondents, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, No. 79-1144 at 22-23 and authorities there cited.

Respondents and amici cite a law review article which questions whether the merits matter in the settlement of certain securities cases. Whatever may be said of the case selection and limited case review performed by the author, the article says nothing about § 10(b) cases. The article surveyed cases involving initial public offerings, so under § 11 of the 1933 Act, the issuer was strictly liable for damages caused by material misrepresentations or omissions, and other defendants were required to prove their own due diligence. *See*, Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 507 (1991); 1933 Act § 11 (15 U.S.C. § 77k).

Respondents and amici also appear to forget that their vexations all arise from class actions. The district courts have the power and duty under Rule 23(e) of the Federal Rules of Civil Procedure to supervise settlements and approve only

settlements which are fair. Parties who believe a partial settlement or an early "stampede" settlement is unfair have a remedy in objecting to it.

Respondents and amici contend that contribution should be implied because § 10(b) litigation imposes excessive burdens on accountants, lawyers and securities professionals, and those burdens should be shared. Petitioners are lawyers and accountants who disagree. Excessive burdens should be removed by appropriate tests of liability, not by distributing their inappropriate consequences on others.

One cannot help but question whether any compelling fairness results from adjusting perpetrators' shares of compensation for victims of intentional and reckless wrongdoing. Unlike most claims in tort and contract, contribution is not founded on the breach of a duty the defendant owed to the plaintiff. Rather, it is founded on the breach of a duty each owed to a third person.[18] Disallowing contribution – altogether or to primary wrongdoers – frustrates no legitimate expectation of compensation for a wrong.

IV.

IF CONTRIBUTION WERE PERMITTED, IT SHOULD BE DENIED TO PARTIES LIKE RESPONDENTS WHO CLAIM TO BE SUBROGATED TO PRIMARY WRONGDOERS

In the world of securities litigation, this is a man-bites-dog case. Peat and amici desire contribution for the benefit of secondary target professionals against issuers of securities and their officers, the primary wrongdoers in fraud cases. Here, insurance carriers claim to be subrogated to the primary wrongdoers and sue the secondary target professionals. If the

[18] *See* 18 C.J.S. Contribution § 2 (1990) ("Also, contribution requires a duty from the third party defendant to the original plaintiff while indemnity posits a duty from the third party defendant to the third party plaintiff, or the original defendant.")

Court considers "fleshing out" and policy arguments, the equivalent of creating common law, it should preclude Employers from pursuing its complaint on common law grounds.

Insurers normally do not become subrogated to their insureds' potential claims against their insureds' professional advisors. *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 107 (2d Cir. 1991); *Goodley v. Wank & Wank, Inc.*, 133 Cal.Rptr. 83, 87-88 (Cal.App. 1976) (claim against attorney not assignable); *Fifield Manor v. Finston*, 354 P.2d 1073, 1078, 7 Cal.Rptr. 377, 387 (Cal. 1960) (non-assignable causes of action are not subject to subrogation) *Kracht v. Perrin, Gartland & Doyle*, 268 Cal.Rptr. 637, 640 (Cal.App.1990) (characterization of claim as something other than malpractice will not evade the rule). Common law policies should bar Employers' claims. Litigation with one's attorneys creates adversity which terminates the attorney-client relationship. Litigation with one's auditors impairs independence and requires their replacement. Insurers should not be permitted to preempt expensive and sensitive client decisions to terminate personal relationships between attorney and client or auditor and client, especially with respect to professionals involved in securities disclosures.

The complaint does not allege that the attorneys and accountants were more at fault than the company and its officers. Instead it admits the fault of the principals. Jt. App. 16, ¶ 26. The material misrepresentations and omissions which must have been the basis of the settlement of the *Cousins* litigation were made by the company and its officers, not Petitioners. The complaint describes alleged misrepresentations and omissions arising out of Cousins' core business operations, including risks relating to expansion plans, failure of sales to meet expectations, excessive and unplanned costs and expenses, lack of internal accounting and management controls, logistic and supply problems, high costs of delivery in some markets, overspending, inability to control costs, failure of the computerized inventory control system, the

profitably of a vital market, the fair market value of related party contracts and acquisition negotiations regarding material leases. Jt. App. 19-23, ¶¶ 33(a), 33(c), 33(d), 33(e); Jt. App. 25, ¶ 37.

If the Court allows contribution in § 10(b) cases, it should deny contribution to Employers in this case, either by applying common law bars to assignment and subrogation or by applying the pari delicto defense as a matter of law to primary wrongdoers who seek contribution from secondary targets.

Respectfully submitted

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